

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL NO. 1456

THIS DOCUMENT RELATES TO:

TRACK 1 TRIAL

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

**PLAINTIFFS' OPPOSITION TO BMS MOTION FOR RECONSIDERATION
OF ADMISSIBILITY OF DX 1227 AND 1268**

Plaintiffs oppose BMS's belated attempt to admit DX 1227 and 1268 through a motion for reconsideration. There is no reason to re-open the trial record at this late date to accommodate the admission of these exhibits. The Court appropriately excluded them, and there is no evidentiary reason to change course now.

BMS contends that it could have called a witness to establish the proper foundation for DX 1227, yet the Court already rejected that attempt:

MR. TRETTER: [T]here's been an objection to 1227, and I would like an opportunity to bring in CRA because they –

THE COURT: No. I've had it with this. It's not a big deal. It's not even these drugs. It's not a big point. She [Dr. Haegele] testified to what she testified to. No. We're going to finish this trial. I'm now committed to this.

Trial Tr. Day 14 at 143.

As for DX 1268, BMS failed to lay a foundation for the document in a timely manner once the Court rejected its use during the examination of Dr. Hartman. As the Court stated in sustaining objection to its use, "[i]t's somebody else's document. It didn't go to knowledge of anyone that we know." Trial Tr. Day 9 at 53. Thus, even had BMS submitted the affidavit of

U.S. Oncology's records custodian in a timely manner at the time BMS sought to use the document with Dr. Hartman, the Court still could have objected it for the independent basis that "[i]t didn't go to the knowledge of anyone that we know."

DATED: September 19, 2007

By /s/ Steve W. Berman
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CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on September 19, 2007, I caused copies of **PLAINTIFFS' OPPOSITION TO BMS MOTION FOR RECONSIDERATION OF ADMISSIBILITY OF DX 1227 AND 1268** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman

Steve W. Berman